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No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

Appeal from the United States District Court for the Eastern District of Michigan

PETITION FOR REHEARING

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INDEX

CITATIONS

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PETITION FOR REHEARING

The Brotherhood of Maintenance of Way Employes and the Railway Labor Executives' Association, petitioners herein, present this petition for a rehearing and, in support thereof, respectfully show:

I.

The Majority Opinion Treats Only of the Legislative History of the Second Sentence of Section 5(2)(f) and Does Not Consider That Sentence From the Aspect of Its Plain Language Which Precludes Resort to Legislative History or If Such History is Relied Upon Must Contain a "Clear Showing" That Something Other Than Employment Was Meant by the Word "Employment" as Used in the Phrase "Worse Position With Respect to Their Employment."

The majority opinion does not discuss the meaning of the plain language of the second sentence of Section 5(2)(f).

There is nothing in subparagraph (f) or Section 5 or the entire Interstate Commerce Act which would indicate that the term "employment" was inserted by Congress in subparagraph (f) as a special term of art and should therefore be understood in any sense other than that which is ordinarily and usually attributed to it. See *Caminetti* v. *United States*, 242 U.S. 470, 485-486, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

This Court has reiterated on innumerable occasions the fundamental rule of statutory construction that the "natural and usual signification of plain terms is to be adopted as the legislative meaning *in the absence of clear showing that something else was meant.*" (Emphasis supplied). *United States* v. *First National Bank*, 234 U.S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co.* v. *Lenroot*, 323 U.S. 490, 65 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co.* v. *United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power Co.* v. *Columbia Elec. Street R. L. & P. Co.*, 172 U.S. 475, 19 S. Ct. 247, 43 L. Ed. 521. The "natural and usual signification" of the term "employment" is the "state of being employed." Webster's New Collegiate Dictionary, 2nd Ed. The first

sentence grants compensation protection based upon the provisions of the Washington Agreement and that is the only protection that has ever been afforded employees under Section 5(2)(f) by the Commission. Therefore, the second sentence becomes meaningless if it does not provide employment protection.

In addition, the application of protection to employees is treated by Congress in the second sentence of Section 5(2)(f) in a manner significantly different than that in which the application of such protection is treated in the first sentence of that provision.

The first sentence of Section 5(2)(f) clearly contemplates that employees will be adversely affected *before* the "fair and equitable arrangement" will be applied to them. That sentence is designed to protect the "interests of the railroad employees affected."

But the second sentence does not contemplate an employee being placed "in a worse position with respect to his employment" before *its* protection is applied to him. The authors of that provision made a significant change in referring to employees in the first and second sentences—while the first sentence refers to "employees affected" the second sentence refers to "employees of carriers affected". In other words, under the second sentence it was contemplated that no employee would be affected within the meaning of the Act and that all employees of *carriers* affected must be kept "in no worse position with respect to their employment." Congress clearly intended no harm (with respect to employment) to be visited upon the employees of carriers affected by its orders.

This significant difference in treatment between the first and second sentences of 5(2)(f) with regard to

the term "affected" strongly indicates that in the first sentence the use of the term "railroad employees affected" intended compensation protection and in the second sentence the use of the term "employees of carriers affected" intended employment protection.

II.

The Majority Opinion, in Considering the Legislative History of Section 5(2)(f), Overlooks the Clear and Precise Explanation of the Meaning of the Term "Worse Position With Respect to Their Employment" as Presented by the Author and the Proponents of That Term as Well as the Official Explanation of the Term Placed in the Congressional Record by the Senate Sponsor of the Legislation Which Contains That Term and Thus Appears to Depart From the Longstanding Rule of This Court That the "Fears and Doubts of the Opposition Are No Authoritative Guide to the Construction of Legislation. It is the Sponsors That We Look to When the Meaning of Statutory Words is in Doubt."

At pages 6-7 and 8 of the majority slip opinion, it is stated:

> "Secondly, the representatives whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise. Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not 'job freeze', was contemplated."

* * * *

> "However, were we to agree [with appellants' position], it would be necessary to say that a substantial change in phraseology was made for no purpose and to disregard the statements of those House members most intimately connected with the final version of the statute."

The author of the specific phase in issue here—"worse position with respect to their employment"—clearly informed the House of Representatives what that phrase meant. His statement was not only clear and precise but was unchallenged by any member of the House:

> "The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, *with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment.* . . .
>
> "The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By adoption of this provision in the transportation bill the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers.* But this provision also contains a clause that permits the industry, through the process of collective bar-

gaining, to work out its problems in a democratic manner.

"Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. *With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur.* If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then *the natural attrition will shortly have absorbed the employees that otherwise would be eliminated* if this Congress does not now deal with this problem."[1] (Emphasis supplied.)

Further, this clear explanation of the meaning of the governing phase was confirmed by every member of the House who spoke in support of its inclusion in the pending legislation.[2] Indeed, when Representative Warren spoke in support of this provision his remarks were greeted with applause by the members of the House.

The statements of the House conferees relied upon in the majority opinion certainly do not provide the "clear showing" that something other than employment protection was meant by the phrase at issue[3] and, in any event, all such statements fall within the pale of the rule repeatedly pronounced by this Court that

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[1] 86 Cong. Rec. 5871.

[2] 86 Cong. Rec. 5867-5868, 5883, 5884.

[3] See dissenting opinion, pp. 5-7.

the "fears and doubts of the opposition are no authoritative guide to the construction of legislation".[4]

It is respectfully submitted that no member of the House was more "intimately connected" with the phrase "worse position with respect to their employment" than was Mr. Harrington and that phrase appears *unchanged* in the final version of the statute.

The change in phraseology accomplished by the Wadsworth motion to recommit was made for a purpose and accomplished that purpose. It eliminated the prohibition against displacement which was contained in the original language of the Harrington Amendment but, according to Harrington himself and all who spoke in its support, that phrase did not eliminate employment protection.

The majority opinion states that the representatives "whose floor statements are entitled to the greatest weight are those who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen who voices were heard in the early skirmishing but who did not participate in the final compromise." The legislator whose word is entitled to at least as great weight as that of Representative Lea is Senator Wheeler who sponsored the Transportation Act of 1940 in the Senate. After the Senate had adopted the Conference Report containing the phrase "no worse position with respect to their employment", Senator Wheeler asked and was

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[4] *Mastro Plastics Corp. et al.* v. *N.L.R.B.*, 350 U.S. 270, 288n, 76 S. Ct. 349, 100 L. Ed. 309; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 3[illegible] 71 S. Ct. 745, 95 L. Ed. 1035; see also *S. H. Camp & Co.* v. *N.L.R.B.* (6th Cir.), 160 F. 2d 519, 521 and cases cited therein.

granted unanimous consent to place in the *Congressional Record* a written document which explained certain provisions of the Transportation Act which had been changed in the bill as originally passed by the Senate. With regard to Section 5(2)(f) this explanatory statement simply read:[5]

> "Present law is also amended *by inclusion of the Harrington Amendment,* protecting employees in the event of consolidations . . ." (Emphasis supplied)

It is respectfully submitted that this document of explanation placed in the *Record* by the Senate sponsor of the Transportation Act overcomes any clouds which might have been placed upon the meaning of the phrase "worse position with respect to their employment" by Congressman Lea. To state that Section 5(2)(f) contains the Harrington Amendment certainly is to say that that amendment contains the protection for employees which Representative Harrington and its proponents intended it to contain and stated that it did contain. If it is claimed employment protection was deleted by the Second Conference Report it must be claimed that it was deleted merely by limiting the operation of the phrase "worse position with respect to their employment" to four years, and if that type of protection was deleted certainly what was left, if anything, could not have been and would not had been called the "Harrington Amendment" in a document which was intended to convey to the Commission the *meaning* of the various provisions of the Transportation Act of 1940.

Indeed, if Congress, in the second sentence of Section 5(2)(f), did not provide employment protection, the

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[5] 86 Cong. Rec., P. 10, 76th Cong., 3rd Sess., p. 11768.

thrice evidenced will of the House to provide such protection was rendered futile.[6]

III.

The Majority Opinion Indicates That Congress Performed a Futile Act in Enacting the Second Sentence of Section 5(2)(f).

At page 5 of the majority slip opinion, it is stated that the report of the "Committee of Six" which became the first sentence of Section 5(2)(f) "urged codification of the Washington Agreement and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939." At footnote 1 on page 2 of the majority slip opinion there is contained a brief explanation of the protection afforded by the so-called New Orleans conditions. These conditions provide little or no more protection than is provided by the Washington Agreement and any modifications of that Agreement found in the New Orleans conditions could have readily been made by the Commission under the "fair and equitable" clause of the first sentence of Section 5(2)(f). The protection afforded employees under the New Orleans conditions is substantially identical to that afforded them under the Washington Agreement and the second sentence of Section 5(2)(f) provides no advantages of substance which would not have been afforded by the application of the Washington Agree-

[6] On three occasions the House voted to provide employment protection: First, when it enacted the Harrington Amendment in its original form; second, when 275 members of the House petitioned the conferees during the first conference to retain the Harrington Amendment in its original form; and, third, when it voted to recommit the first conference report with the words "worse position with respect to their employment" which the author and proponents of those words explained as providing employment protection, and their explanations were *not* challenged.

ment under the first sentence of Section 5(2)(f). Therefore, the Congress accomplished nothing by its use of the term "worse position with respect to their employment." Cf. *United States* v. *Lexington Mill & E. Co.*, 232 U.S. 399, 409-410.

IV.

The Majority Opinion Indicates, By Its Reliance Upon the Failure of the Commission to Impose Employment Protective Conditions Subsequent to the Passage of Section 5 (2)(f), That the Majority Has Departed from the Rule Recently Announced By This Court in Baltimore and Ohio Railway Company v. Jackson, 353 U.S. 325.

At pages 9 and 11 of the majority slip opinion, it is stated:

> "The Commission has consistently followed this practice to date in over 80 cases, * * *.
>
> * * * *
>
> "In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, * * *."

In the *Jackson* case, the Commission relied upon its refusal to interpret the Safety Appliance Acts (45 U.S.C. §§ 1 et seq.) as applicable to maintenance of way vehicles. In the words of the dissenting opinion in that case the "inapplicability of the Safety Appliance Acts to maintenance-of-way vehicles is confirmed by the long-standing administrative interpretation of the Interstate Commerce Commission and by numerous practical considerations. The Interstate Commerce Commission has administered these Acts for over half a century. During that time, it has, by its own statement, 'never considered the small maintenance of way vehicles subject to those Acts . . . .' Its order of March

13, 1911, specifying the number, dimensions and location of the appliances required by the Acts, omits all mention of motor track cars and push trucks." (353 U.S. at 341.) Continuing, the dissenting opinion states that this disclaimer by the Commission of the application of the Acts is all the more impressive because those Acts "impose an affirmative duty on the Commission to enforce their provisions." (353 U.S. at 342.)

The dissenting opinion in the *Jackson* case also concluded, similarly to the conclusion reached in the majority opinion in this case, that it was "significant that the Brotherhood of Maintenance of Way Employes, whose members operate and maintain motor cars in their work, never has contended that the Safety Appliance Acts apply to these vehicles. However, the Brotherhood has been active in soliciting other legislation which it feels would add to the safety of its members. * * * This state legislation [secured through the efforts of the Brotherhood] dealing expressly with the safety requirements of motor track cars indicates that the Federal Acts have not been thought to apply to them." (353 U.S. 343-344.)

The situation confronting this Court in the *Jackson* case, insofar as the rule of administrative interpretation and the attitude of the Brotherhood is concerned, was precisely the same as that which confronts this Court in this case, but in the *Jackson* case the Court held:

> "It is contended that, since the Commission has for over 60 years considered maintenance-of-way vehicles not subject to the Acts, this consistent administrative interpretation is persuasive evidence that the Congress never intended to include them within its coverage. It is true that long administrative practice is entitled to weight, Davis v. Manry, 266 US 401, 405, 45 S Ct 163, 69 L ed

350, 352 (1925), but there has been no expressed administrative determination of the problem. We believe petitioner overspeaks in elevating negative action to positive administrative decision. In our view the failure of the Commission to act is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Acts. See Shields v. Atlantic Coast Line R. Co., 350 US 318, 321, 322, 76 S Ct 386, 100 L ed 364, 367, 368 (1956)."

V.

It Is Respectfully Submitted That the Majority Opinion Errs in Relying Upon the Memorandum Brief Submitted by the Railway Labor Executives' Association in a Case Decided in June 1941, Finance Docket No. 12460, Ft. Worth & D. C. R. Co. Lease, 247 ICC 119, Because in That Case, in the Words of the Majority Opinion (Slip Opinion, p. 9), "the RLEA Argued at Length That § 5(2)(f) Did Not Impose a Mandatory Job Freeze Requirement—Compensatory Conditions Would Be Satisfactory."

The RLEA's position in that case should not be relied upon in support of a finding that Section 5(2)(f) requires only compensation protection any more than should the carrier's position in that case be relied upon to support a finding that employment protection was intended to be provided by Section 5(2)(f). In fact, the railroad in that case argued that a job freeze was intended by the second sentence of Section 5(2)(f) for a period of four years from the date of the Commission's order and that no protection could be provided beyond four years. The *Ft. Worth* case involved a transaction which arose and was originally decided prior to the enactment of the Transportation Act of 1940. On October 7, 1940, the Commission permitted the applicant to file an amendment to its application under the newly enacted provisions of Section 5(2).

On December 2 and 3, 1940, briefs were filed and the case was submitted to the Commission in February 1941. In that case, the major changes proposed by the applicant would have occurred *after* the four-year protective period provided in Section 5(2)(f) had expired. The railroad took the position which was later taken by the Commission and rejected by this Court in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, that the protection provided by Section 5(2)(f) was limited to a maximum of four years. The railroad contended that it need only keep the employees on during that four-year period and thereafter would owe them nothing under the statute.

The RLEA was confronted with a possible interpretation which would limit the protection afforded under the Washington Agreement and theretofore provided by the Commission, argued that anyone affected after the four-year period had expired should be provided at least compensation protection. It also argued that the few employees who might be affected during the four-year period should get similar protection. Such a position was required and justified because the RLEA, at that early date, was faced with a possible decision which might have effectively deprived the vast majority of employees of all protection.

The Commission denied the application and thereby made no construction of the statute. However, it is significant that the dissent of Chairman Eastman (247 ICC at 132) implies that had the majority of the Commission approved that application it might have tended to the conclusion that employment protection rather than compensation protection was indeed re-

quired by the statute but that it was limited to a maximum rather than a minimum of four years.

VI.

The Majority Opinion Misconstrues Appellants' Reliance Upon RLEA v. United States, 339 U.S. 142, as Based Upon "Only One Change" Having Been Made in the Harrington Amendment.

At page 10 of the majority slip opinion, it is stated:

> "Appellants point to passages in the opinion, 339 U.S., at 151-154, in which, they assert, the Court recognized that only *one* change—the four-year limitation—was blended into the Harrington amendment between origination and final approval. However, this contention ignores the plain recognition of the Court, revealed on page 152 of the opinion, that two changes occurred, one of which being the alteration in language pertinent to the resolution of this case."

The recognition of a change in the Harrington Amendment at page 152 of this Court's opinion in the *RLEA* case is apparently a reference to the sentence on that page which reads: "The modification of the Harrington amendment is not now material." The appellants have never contended that the original language of the Harrington Amendment was not altered. They do contend, however, that the alteration produced no change of substance and rely upon the opinion of this Court in the *RLEA* case when, after stating that the modification on recommittal of the Harrington Amendment was not material, stated that the Second Conference Report contained a "substantial change in the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval." (339 U S. at 153.) The

appellants further rely upon the statement in this Court's opinion in the *RLEA* case in which it states:

> "The second sentence thus gave a limited scope to the Harrington amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

It is respectfully submitted that the opinion in the *RLEA* case, while it recognizes that two changes were made in the Harrington Amendment, also recognized that there was but one change of *substance* and that change did not effect a change in the *type* of protection afforded by the Harrington Amendment but only upon the length of time that such protection would be required to be provided. The above-quoted excerpt from this Court's opinion in the *RLEA* case is relied upon as recognition by this Court that the Harrington Amendment provided employment protection for a limited period and it is respectfully submitted that appellants are supported in their reliance upon this language by the dissenting opinion in *The Order of Railroad Telegraphers, et al.* v. *Chicago and North Western R. Co.*, 362 U.S. 330, which quoted this language as recognizing a requirement of employment protection and expressed disagreement with it (362 U.S. at 356-357.)

The reference by the dissenting opinion in the *ORT* case to the *RLEA* opinion was elicited as a result of the majority opinion's statement that Section 5(2)(f) requires the Commission to include " 'terms and conditions' which provide that for a term of years after a consolidation employees should not be 'in a worse position with respect to their employment' *than they would otherwise have been.*" (Emphasis supplied.)

It is respectfully submitted by petitioners that the emphasized portion of the above-quoted excerpt from this Court's opinion while it may not constitute a discussion of the present problem clearly indicates that the second sentence of Section 5(2)(f) requires that for a period of four years an employee shall be in the same position regarding his employment as he would have been had no merger, etc., taken place. It is respectfully submitted that such is the only interpretation which can be placed upon this language and that if this language does not mean that employment shall be protected, it means nothing.[7]

VII.

It Is Respectfully Submitted That the Majority Opinion Errs in Citing City of Nashville v. United States, 355 U.S. 63, as a Case in Which the Commission Imposed Less Comprehensive Employee Conditions Than Those Imposed in the Instant Case.

At page 9, footnote 9 of the majority slip opinion, it is stated:

> "It is noteworthy that this Court has recently affirmed a case in which the Commission imposed less comprehensive conditions than those in this case. *City of Nashville* v. *United States*, 355 U.S. 63."

The conditions imposed in the case referred to in the majority opinion are the *identical* conditions imposed in this case. The decision of the Commission in that case is unreported, but can be found in Commission Finance Docket No. 18845, decided March 1, 1957. At

[7] Cf. dissenting slip opinion, p. 7, wherein it is stated that "in a realistic sense a man without a job is 'in a worse position with respect to' his 'employment', though he receives some compensation for doing nothing."

Sheet 65 of the Commission's opinion in that case there is the following statement with regard to the protection imposed for employees:

> "Under the circumstances, we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case*, 282 ICC 271."

VIII.

It Is Respectfully Submitted That the Majority Opinion Errs in Upholding the District Court's Consideration of Certain Brotherhood Publications on the Ground That Appellants Raised No Objections Below.

At page 9, footnote 8 of the majority slip opinion, it is stated:

> "It is clear that the District Court did not err in taking cognizance of these publications, particularly since appellants raised no objections below. Cf. *Texas & Pacific R. Co.* v. *Pottorff*, 291 U. S. 245, 254."

The excerpts from the publications referred to in the majority opinion were never offered in evidence by the appellees in this proceeding but were quoted in appellees' briefs to the District Court. Since such material was never offered in evidence, it could not have been objected to by appellants.

IX.

It Is Respectfully Submitted That the Majority Opinion Errs in Indicating That Appellants Relied Upon "Unexplained Opposition" and Then Apparently Considers as Significant the Fact That Representatives Harrington, Warren and Thomas Voted Against the Final Version of Section 5(2)(f).

Appellants do not rely upon unexplained opposition. The opposition to the Harrington Amendment was explained by Mr. Lea. Mr. Lea was told on two occasions that the fears which he had as to the effect of the term "worse position with respect to their employment" was baseless and erroneous.[8]

The apparent reliance of the majority opinion upon the fact that Representatives Harrington, Warren and Thomas voted against the final version of the bill certainly does not constitute "unexplained opposition" by Mr. Harrington. The Congressional Record clearly shows that Representative Harrington voted against the final version of the bill only because the conferees had eliminated railroad abandonments from its purview.[9] 86 Cong. Rec. 10187, 10192. See dissenting slip opinion, p. 5, footnote 10.

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[8] 86 Cong. Rec. 5870, 5871.

[9] Since the term "worse position with respect to their employment" was not altered by the conferees the most that could be assumed as the motive underlying the votes of Representatives Warren and Thomas was that they objected to the protection afforded by that phrase being limited to four years.

X.

It Is Respectfully Submitted That the Majority Opinion Errs in Dismissing the Appellants' Objection Regarding the Refusal of the Lower Court to Consider Certain Testimony Concerning the Adequacy of the Conditions on the Ground That the Lower Court Did Not Refuse to Accept Appellants' Proof But Refrained From Ruling on the Matter and the Appellants Never Renewed Their Efforts.

At page 3, footnote 2 of the majority slip opinion, it is stated:

> "In this connection, it should be noted that appellants have contended that the lower court erred when it refused to accept certain testimony concerning the adequacy of the conditions. The short answer to this is that the court did not refuse to accept appellants' proof; the court explicitly refrained from ruling on the matter when the offer was made and appellants never renewed their efforts. See R. 179."

The page of the record cited in the majority opinion shows that the court below did, in fact, refuse to consider the testimony offered and prevented appellants from "renewing their efforts" to offer it. The testimony was offered and the court through Judge O'Sullivan said (R. 179):

> "If we conclude that it is proper for us to give any attention to the testimony offered before Judge Thornton, we will advise the respondents and give them, which I think would be only fair, the right to meet any part of that testimony by their evidence."

The statement of Judge O'Sullivan and the opinion thereafter rendered by the court (R. 196-203) makes clear the fact that the court gave no attention to that testimony and the quoted ruling of the court effectively prevented appellants from pursuing the matter further.

XI.

It Is Respectfully Submitted That the Majority Opinion Erred in Relying Upon the Provisions of Section 222(f) of the Communications Act of 1943, 47 U.S.C. § 222(f), in Support of Its Conclusions.

At page 6, footnote 5 of the majority slip opinion, it is stated:

> "As further evidence that Congress would have specified 'job freeze' had it meant 'job freeze' in the 1940 Act, compare the 1943 amendment to § 222(f) of the Communications Act, 47 U.S.C. § 222(f) . . ."

The legislative history of Section 222(f) emphasizes the fact that the employee protection provided in that Section protected employees from loss of employment for *any* reason and not merely loss of employment because of a merger. It was the extension of employment protection to loss of employment from any cause which elicited the discussion on the floor of the Senate.

The legislative history of Section 222(f) also confirms the fact that the Senate in 1943 knew just how far it had gone in providing employment protection by its enactment of the Harrington Amendment. A statement of Senator Hawks which was read by Senator Taft on the floor of the Senate during the debate on Section 222(f) points this out. Senator Hawk's statement as read by Senator Taft is as follows:[10]

> "The provision protecting employees of any merged company that occurs under this act should not be any *more* exacting on the merged companies than the provisions contained in the amendment of 1940 to the Interstate Commerce Act authorizing the consolidation and merger of railroads. The

[10] 89 Cong. Rec., Part 1, 78th Cong., 1st Sess., p. 1195.

merged company should not be compelled to keep employees, who *under ordinary conditions*, could be dismissed by either of the companies merging. The purpose of the act should be to protect only employees who might be discharged as the result of the merger itself. . . . I do not believe the protection should go to the point of *guaranteeing employment* to those who would have been released in any event *regardless* of the merger." (Emphasis supplied.)

Section 5(2)(f) did not protect employees from being discharged under "ordinary conditions" and, in the opinion of Senator Hawks and others, neither should the Communications Act of 1943. If anyone opposing the employee protection feature of the 1943 Act had for a moment believed that Section 5(2)(f) did not protect employees from furloughs or dismissals resulting from the merger it seems reasonable to assume that they would have used that view to oppose the type of provision with which they were faced. It is of significance that they did not.

CONCLUSION

Your petitioners respectfully represent that the majority opinion gives no effect to or departs from this Court's rules that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of a clear showing that something else was meant"; that the "fears and doubts of the opposition are no authoritative guide to the construction of legislation but it is to the sponsors that the Court looks when the meaning of statutory words is in doubt"; that "all words used in a statute should be given their proper signification and effect"; and that "negative action is not to be considered a binding administrative interpretation".

Your petitioners also respectfully represent that the majority opinion errs in finding that the conditions imposed by the Commission in the *Louisville & Nashville Merger* case were less comprehensive than those imposed in this case; that the appellants could have raised objection to the consideration by the District Court of publications relied upon by that court; and that appellants had the opportunity to renew their efforts to secure consideration by the District Court of certain testimony concerning the adequacy of the conditions imposed.

Your petitioners therefore respectfully submit that rehearing should be granted to give effect to these rules of this Court upon the issues in this case and to permit your petitioners to present to the Court their bases for the modification of the majority opinion in accordance with the circumstances surrounding the consideration by the court below of extra-record facts and refusal

by the court below to consider certain sworn testimony placed before it.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, William Grattan Mahoney, one of the counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM GRATTAN MAHONEY
One of the Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES

No. 681.—October Term, 1960.

Brotherhood of Maintenance of Way Employes, et al., Appellants, v. United States, et al.	On Appeal From the United States District Court for the Eastern District of Michigan.

[May 1, 1961.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The dispute in this case commenced when the Delaware, Lackawanna & Western Railroad Co. and the Erie Railroad Co. filed a joint application for approval by the Interstate Commerce Commission of a proposed merger, the surviving company to be known as the Erie-Lackawanna Railroad Co. Supervision by the Commission of railroad mergers is required by § 5 (2) of the Interstate Commerce Act, 54 Stat. 905, 49 U. S. C. § 5 (2), and the statute directs the Commission to authorize such transactions as it finds will be "consistent with the public interest." The Commission concluded in this case that the public interest would be served by a merger of the two applicants and that finding has not been questioned. The point in issue is whether the conditions attached to the merger for the protection of the employees of the two roads satisfy the congressional mandate embodied in § 5 (2)(f) of the Act which provides in relevant part that:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equi-

table arrangement to protect the interests of the railroad employees affected. *In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment*, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was an employee of such carrier or carriers prior to the effective date of such order." (Emphasis added.)

Before the Commission's hearing examiner, the railroads suggested that the "New Orleans" conditions be imposed in satisfaction of § 5 (2)(f). These conditions derive their name and substance from the Commission's decision in the *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271, and they provide compensation benefits for employees displaced or discharged as a result of a merger.[1] After the hearing had concluded, however, appellant Railway Labor Executives' Association (RLEA) filed a brief with the examiner claiming that compensatory conditions were not enough since, in its

[1] Briefly, the New Orleans conditions prescribe the following: employees retained on the job but in a lower paying position get the difference between the two salaries for four years following the merger; discharged employees get their old salaries for four years, less whatever they make in other jobs, or they may elect a lump sum payment; transferred employees get certain moving expenses, and certain fringe benefits are insured; and any additional benefits that a given employee would have received under the Washington Job Protection Agreement, discussed in the text *infra*, are guaranteed.

view, the second sentence of § 5 (2)(f) imposes a minimum requirement that no employee be discharged for at least the length of his prior service up to four years following consummation of the merger. The hearing examiner did not agree with the RLEA's reading of § 5 (2)(f) and recommended the New Orleans conditions to the Commission, a recommendation which the Commission unanimously adopted. 312 I. C. C. 185. Appellants then instituted proceedings in the United States District Court of Michigan, seeking to enjoin the Commission's order approving the merger. A temporary restraining order issued following testimony by a representative of the RLEA that irreparable injury to the employees would otherwise ensue. However, after hearing the case on its merits, the District Court dissolved the restraining order and dismissed appellants' complaint. 189 F. Supp. 942. Direct appeal to this Court followed and we noted probable jurisdiction. 365 U. S. 809.

Preliminarily, it must be noted that the adequacy of the New Orleans conditions is not an issue before this Court: Appellants did not challenge their sufficiency below, nor do they argue the point here.[2] Rather, appel-

[2] Appellants do relate certain objections to the adequacy of the conditions but it seems clear that these objections, which were not introduced before the Commission or the court below except at the hearing for temporary injunctive relief, have been included in appellants' brief only as background material. If appellants wish to challenge directly the adequacy of the conditions, it seems clear that they may still proceed to do so pursuant to § 5 (9) of the Act.

In this connection, it should be noted that appellants have contended that the lower court erred when it refused to accept certain testimony concerning the adequacy of the conditions. The short answer to this is that the court did not refuse to accept appellants' proof; the court explicitly refrained from ruling on the matter when the offer was made and appellants never renewed their efforts. See R. 179.

lants' sole contention is that no compensation plan is adequate unless it is based on the premise that all the employees currently on the payroll remain in the surviving railroad's employ for at least the length of their previous employment up to four years. Appellants do not say that every employee must remain in his present job, but they do insist that some job must remain open for each one. We think, however, that a review of the background of § 5 (2)(f) and its subsequent interpretation demonstrates the defects in appellants' position.

Section 5 (2)(f), as it now appears, was enacted as part of the Transportation Act of 1940. A broad synopsis of the occurrences which led to the enactment of those sections on railroad consolidation of which § 5 (2)(f) is a part is contained in the Appendix to this Court's opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315, and it is unnecessary to reproduce that material here except to note that: "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5 (2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States*, 356 U. S. 412, 416. The relevant events, for present purposes, date from 1933, when Congress passed the Emergency Railroad Transportation Act, 48 Stat. 211. That Act contemplated extensive railroad consolidations and provided for employee protection pursuant thereto in the following language:

> "[N]or shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

Shortly before the Emergency Act expired in 1936, a great majority of the Nation's railroads and brotherhoods entered into the Washington Job Protection Agreement,[3] an industry-wide collective bargaining agreement which also specified conditions for the protection of employees in the event of mergers. Unlike the Emergency Act, however, the Washington Agreement provided for compensatory protection rather than the "job freeze" previously prescribed. Subsequently, efforts commenced to re-evaluate the law relating to railroad consolidations and a "Committee of Six" was appointed by the President to study the matter. Those portions of the Committee's final report pertaining to employee protection urged codification of the Washington Agreement[4] and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939. 84 Cong. Rec. 6158. The Senate bill contained language identical to that now found in the first sentence of § 5 (2) (f)—*i* ., the transaction should contain "fair and equitable" conditions.

A bill similar in this respect to S. 2009 was introduced in the House but, before it was sent to the Conference Committee, Representative Harrington inserted an amendment which added a second sentence to the one contained in the original version, this sentence stating that:

> "[N]o such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882.

[3] A discussion of this agreement and its terms is found in *United States* v. *Lowden*, 308 U. S. 225.

[4] See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531 and H. R. 4862, 76th Cong., 1st Sess. 216–217, 278.

The bill came out of the Conference Committee without Representative Harrington's addendum and, dissatisfaction having been expressed by Representative Harrington and others, a motion to recommit was passed by the House. This motion required that the language of the original House bill be restored "but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment" should speak as the second sentence of § 5 (2)(f) now does—*viz.*, "[the] transactions will not result in employees of said carriers . . . being in a worse position with regard to employment." 86 Cong. Rec. 5886. This new phraseology was adopted by the Conference Committee, with the added limitation that such protection need extend no more than four years, and the bill passed without further relevant alteration. 86 Cong. Rec. 10193, 11766.

It would not be productive to relate in detail the various statements offered by members of the House to explain the significance of the events outlined above. It is enough to say that they were many, sometimes ambiguous and often conflicting. However, certain points can be made with confidence. First, it is clear that there were two alterations made in the substance of the original Harrington amendment: Not only was a four-year limitation imposed, but also general language of imprecise import was used in substitute for language clearly requiring "job freeze" such as appeared in the original amendment and the 1933 Act.[5] Secondly, the representatives

[5] As further evidence that Congress would have specified "job freeze" had it meant "job freeze" in the 1940 Act, compare the 1943 amendment to § 222 (f) of the Communications Act, 47 U. S. C. § 222 (f), where an employee protective arrangement was added by the following language:

"Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger,

whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise.[6] Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not "job freeze," was contemplated.[7] Appellants vigorously argue that the

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and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry." See also the remarks of Senator White, a proponent of this bill, at 89 Cong. Rec. 1195–1196.

[6] Appellants point out that several members of the conference committee opposed the motion to recommit. However, as appellants must concede, reliance on unexplained opposition to a proposal is untrustworthy at best. Witness the fact that all the House members on whose remarks appellants base their position. (Representatives Warren, Harrington, and Thomas) voted *against* the final version of the bill.

[7] See the remarks of conference chairman Lea at 86 Cong. Rec. 10178, particularly that part of his explanation responding to questions put by Representatives Vorys and O'Connor, where it was said:

"Mr. VORYS of Ohio. Mr. Speaker, will the gentleman yield?

"Mr. LEA. I yield to the gentleman from Ohio.

"Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?

"Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits

legislative history of § 5 (2)(f) supports their interpretation. However, were we to agree, it would be necessary to say that a substantial change in phraseology was made for no purpose and to disregard the statements of those House members most intimately connected with the final version of the statute.

The indications gleaned from the history of the statute are reinforced and confirmed by subsequent events. Immediately after the section was passed, interested parties—including the brotherhood appealing in this case—expressed the opinion that compensation protection for discharged employees was the intendment of § 5 (2)(f).[8] The Commission echoed this interpretation

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are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

"Mr. VORYS of Ohio. That would be whether or not they were still employed?

"Mr. LEA. Yes.

"Mr. O'CONNOR. Mr. Speaker, will the gentleman yield?

"Mr. LEA. I yield to the gentleman from Montana.

"Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

"Mr. LEA. I take that to be the correct interpretation of those words."

See also the statements of conference member Halleck at 86 Cong. Rec. 10187, and conference member Wolverton at 86 Cong. Rec. 10189. The Conference Report also lends itself to this interpretation. H. R. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68–69.

[8] In its official organ, appellant Brotherhood of Maintenance of Way Employes stated:

"Four Years' Full Pay

"The law provides that any employe who has been in the service of a railroad four years or more, and loses his job because of a merger

in its next annual report, I. C. C. 55th Ann. Rep. 60–61, and began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions. See, *e. g.*, *Cleveland & Pittsburgh R. Co.* v. *Purchase*, 244 I. C. C. 793 (1941). The Commission has consistently followed this practice to date in over 80 cases, with the full support of the intervening brotherhoods and the RLEA;[9] indeed, in one case where a variant of the present dispute arose, the RLEA argued at length that § 5 (2)(f) did *not* impose a mandatory job freeze requirement—compensatory conditions would be satisfactory.[10] It is true that many of these prior transactions did not involve consolidations of the magnitude here presented. However, the relevance of this point is unclear since the statute makes no distinctions based on the type of transaction considered, and it is apparent that

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or 'coordination', must be paid his full wages for four years. If he has been a railroad employe less than four years, he must be paid his full wages for a period as long as his previous service.

"No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these unprecedented benefits through the Brotherhood of Maintenance of Way Employes, in a cooperative movement with the other Standard Railroad Labor Organizations." 49 Journal 13–14 (Oct. 1940).

See also 57 The Railway Conductor 308 (Oct. 1940); 39 Railway Clerk 467, 488. It is clear that the District Court did not err in taking cognizance of these publications, particularly since appellants raised no objections below. Cf. *Texas & Pacific R. Co.* v. *Pottorff*, 291 U. S. 245, 254.

[9] A comprehensive list of the decided cases, with a description of the conditions imposed, is found in the Appendix to the Brief of the United States in this case. It is noteworthy that this Court has recently affirmed a case in which the Commission imposed less comprehensive conditions than those in this case. *City of Nashville* v. *United States*, 355 U. S. 63.

[10] See Memorandum Brief of RLEA, Finance Docket No. 12460, filed in *Fort Worth & D. C. R. Co. Lease*, 247 I. C. C. 119.

the underlying principle remains the same whether 100 or 1,000 employees are affected.[11]

Appellants' last point is that two cases in this Court have previously treated the present question favorably to their position. *Railway Labor Executives' Assn.* v. *United States*, 339 U. S. 142, and *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.*, 362 U. S. 330. However, neither the holding nor the language of these cases, in fact, supports appellants' claim. The RLEA case was not concerned with the types of protection to be afforded employees for the first four years following the merger; the only question was whether compensatory benefits could be extended beyond four years, and the Court held they could. Appellants point to passages in the opinion, 339 U. S., at 151-154, in which, they assert, the Court recognized that only *one* change—the four-year limitation—was blended into the Harrington amendment between origination and final approval. However, this contention ignores the plain recognition of the Court, revealed on page 152 of the opinion, that two changes occurred, one of which being the alteration in language pertinent to the resolution of this case. The *Railroad Telegraphers* case is equally inapposite. The question in that case concerned the power of a federal court to enjoin a strike over the railroad's refusal to bargain concerning a "job freeze" proposal in the collective

[11] According to the findings of the hearing examiner in this case, 863 employees will be totally deprived of employment during the five-year period following the merger. Appellants argue that there is no need for these discharges since natural attrition will open up many more than 863 jobs during the same period. However, as the railroads point out, attrition does not work in a uniform or predictable manner and there is no indication that the elimination of surplus posts can be accomplished by the method appellants suggest; moreover, if attrition does open up suitable positions, the railroad is bound by the collective bargaining agreement to call back the discharged employees.

bargaining contract, and there is no discussion of the present problem in the opinion of the Court.

In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct. Consequently, the judgment of the District Court must be

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 681.—October Term, 1960.

Brotherhood of Maintenance of Way Employes, et al., Appellants, v. United States, et al.	On Appeal From the United States District Court for the Eastern District of Michigan.

[May 1, 1961.]

Mr. Justice Douglas, dissenting.

This case is a minor episode in an important chapter of modern history. It concerns the impact of economic and technological changes on workers [1] and the manner in

[1] "In California, the Bank of America installed electronic computers in its mortgage-and-loan operation, and 100 employees are now doing the work of 300. In Cleveland, an electronically controlled concrete plant can in one hour produce 200 cubic yards of concrete in any of 1,500 mixing formulas, without a single worker performing manual labor at any point in the process.

"In a bakery in Chicago, one man operates a piece of equipment that moves 20 tons of flour an hour, replacing 24 men who used to move 10 tons an hour. In the bread-baking department of this same plant, one half of the workers were supplanted by automation, and in the wrapping department, no less than 70 per cent of the workers formerly needed have been replaced by machines.

"In the textile industry, entire plants have moved out of New England towns to set up new automated factories in the South, using a comparative handful of workers and leaving great hardship and suffering behind. In the automobile industry, new electronically controlled assembly lines helped to cut total employment by 20 per cent between 1956 and 1958, and over 200,000 workers dropped out of the United Automobile Workers from mid-1957 to early 1959.

"In the shipping industry, huge containers are now packed and sealed at factories and loaded directly aboard special new compartmented ships, eliminating the need for thousands of longshoremen. In the transportation-equipment industry, production rose, but employment fell by a quarter of a million workers between January

which government will deal with it. The courts do not determine that policy; it is a legislative matter. But the judicial attitude has much to do with the manner in which legislative ambiguities will be resolved.

There are some who think that technological change will produce both our highest industrial and business activity and our greatest unemployment. Dr. Robert M. Hutchins recently stated the basic conflict between individual freedom and technology:

> "Individual freedom is associated with doubt, hesitancy, perplexity, trial and error. These technology cannot countenance. Liberty under law presupposes the supremacy of politics. It presupposes the possibility, for example, that political deliberation might lead to the decision to postpone the introduction of a new machine. Technology, on the other hand, asserts that what we can do is worth doing; the things most worth doing are those we can do most efficiently. . . ." Two Faces of Federalism (1961), p. 22.

The measure of the conflict is seen only in a broad frame of reference. As Dr. Hutchins said:

> "Technology holds out the hope that men can actually achieve at last goals toward which they have been struggling since the dawn of history: freedom from want, disease, and drudgery, and the consequent opportunity to lead human lives. But a rich, healthy, workless world peopled by biomechanical links is an inhuman world. The prospects of humanity turn upon its ability to find the law that will direct technology to human uses." Two Faces of Federalism (1961), p. 24.

1956, and December, 1958. In the rubber industry, there was a drop of 25,000 workers. In the chemical industry, 36,000 workers were displaced by automation." Davidson, Our Biggest Strike Peril: Fear of Automation, Look Magazine, April 25, 1961, pp. 69, 75.

The Secretary of Labor, Arthur J. Goldberg, recently put the problem in simple terms:[2]

> "The issue being joined in our economy today—one that is present in some form in every major industrial negotiation—is simply stated: how can the necessity for continued increases in productivity, based upon labor-saving techniques, be met without causing individual hardship and widespread unemployment?"

This case is a phase of that problem.

This is not the first instance of a controversy settled in Congress by adoption of ambiguous language and then transferred to the courts, each side claiming a victory in the legislative halls.[3]

The Senate passed a bill which required the Interstate Commerce Commission in approving a railroad merger to make "a fair and equitable arrangement to protect the interests of the employees affected."[4] The House Committee adopted the same language.[5] When the bill reached the floor of the House, Mr. Harrington suggested the following *proviso*:[6]

> "Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers or in the impairment of existing employment rights of said employees."

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[2] Goldberg, Challenge of "Industrial Revolution II," N. Y. Times Magazine, Apr. 2, 1961, p. 11. And see A. H. Raskin's recent series in the New York Times. N. Y. Times, Thursday, Apr. 6, 1961, p. 1, col. 3; N. Y. Times, Friday, Apr. 17, 1961, p. 1, col. 3; N. Y. Times, Saturday, Apr. 8, 1961, p. 1, col. 3; N. Y. Times, Sunday, Apr. 9, 1961, p. 1, col. 3.

[3] See Newman and Surrey, Legislation (1955), pp. 158-178.

[4] S. Rep. No. 433, 76th Cong., 1st Sess., p. 29.

[5] H. R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

[6] 84 Cong. Rec., pt. 9, 75th Cong., 1st Sess., pp. 9882-9883.

That amendment would have prohibited permanently the displacement of employees as a result of mergers. It was adopted by the House.[7] But in Conference that *proviso* was eliminated along with the merger provisions that gave rise to it.[8] The House recommitted the bill with instructions that the provisions relating to combinations and consolidations of carriers be included in the bill, and be amended to provide that the Commission must include in its orders authorizing mergers "terms and conditions providing that such transactions will not result in employees of said carriers being in a worse position with respect to their employment."[9]

The Conference accepted this version, limiting the protective clause to four years. The Conference Report emphasizes that the change made in the Harrington proposal was in limiting its operation to four years.[10]

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[7] 86 Cong. Rec. 9887.

[8] H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

[9] 86 Cong. Rec., pt. 6, 76th Cong., 3d Sess., p. 5886.

[10] "The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of 4 years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

"In order words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than

Mr. Lea, Chairman of the House Conferees, stated the same in the House: [11]

> "The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, *the employees have the protection against unemployment for 4 years*, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.
>
> "There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad

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4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation." H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 69.

The Court refers to the "unexplained opposition" of Mr. Harrington to the final version of the bill. But the record offers a plausible explanation for his opposition. Mr. Harrington himself apparently had decided that the proposed amendment was objectionable because it failed to cover abandonments. 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10187. And see the remarks of Mr. Crosser, 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10192.

[11] 86 Cong. Rec., pt. 9, p. 10178.

company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement." (Italics added.)

Mr. Wolverton, another House Conferee, stated: [12]

"It was recognized that the real intent of the sponsors was to save railroad *employees from being suddenly thrust out of employment* as the result of any consolidation or merger entered into." (Italics added.)

These are the statements [13] which, the Court says, "are entitled to the greatest weight" in interpreting the *proviso*. I do not think that these statements—nor any part of this legislative history—"clearly reveal an understanding that compensation, not 'job freeze,' was contemplated." Instead I find this legislative history—as the Court elsewhere seems to recognize—to be, at best,

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[12] *Id.*, p. 10189.

[13] The third House Conferee on whose remarks the Court seems to rely is Congressman Hillelek. But he merely says that the *proviso* "follows the principle of the so-called Washington agreement." What that principle was he makes clear in his next sentence: "This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and beyond that writes it into law." *Id.*, p. 10187. The Court also relies on Congressman Lea's acquiescence in the assertions—more or less equivocal—of Congressmen Vorys and O'Connor. But, even assuming those assertions negative a guarantee of continuing employment, Congressman Lea's acquiescence hardly jibes fully with his more extended remarks on the same subject which I have quoted above.

ambiguous. Compensatory relief will result in the employees bearing the initial shock of the railroads' reduction in plant. The Commission and the railroad contend for a philosophy of firing first and picking up the social pieces later. The Court seizes on ambiguous materials to impute to Congress approval of that philosophy. I would resolve the ambiguity in favor of the employees. I would read the *proviso* as meaning that nothing less than four-year employment protection to every employee would satisfy the Act, though not necessarily a four-year-protection in his old job. In a realistic sense a man without a job is "in a worse position with respect to" his "employment," though he receives some compensation for doing nothing. Many men, at least, are not drones; and their continued activity is life itself. The toll which economic and technological changes will make on employees is so great that they, rather than the capital which they have created,[14] should be the beneficiaries of any doubts that overhang these legislative controversies when they are shifted to the courts.

[14] Lincoln in his annual message to Congress, Dec. 3, 1861, stated: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." V Basler, The Collected Works of Abraham Lincoln (1953), p. 52.